

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MARYLAND

3 EQUAL EMPLOYMENT :
OPPORTUNITY COMMISSION

4 Plaintiff :
and :
KATHY C. KOCH :
Plaintiff-Intervenor

7 v. : NO. WDQ-02-CV-648

8 LA WEIGHT LOSS CENTERS, INC:

9 Defendant : Pages 1 - 56

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14 Motions Hearing

15 Baltimore, Maryland

16 Tuesday, June 29, 2004

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21 Reported by: Kathleen R. Turk, RPR-RMR

	<p>Page 2</p> <p>1 2 3 4 5 June 29, 2004 6 4:20 p.m. 7 8 Motions Hearing held telephonically before 9 The Honorable Paul W. Grimm at the offices of: 10 11 Ober, Kaler, Grimes & Shriner 12 120 East Baltimore Street 13 Ninth Floor, Chesapeake Room 14 Baltimore, MD 21202 15 16 17 Pursuant to notice, before Kathleen R. Turk, RPR-RMR, 18 a Notary Public of the State of Maryland. 19 20 21</p>
	<p>Page 4</p> <p>1 Wolf, Block, Schorr and Solis-Cohen, LLP 2 For the Defendant LA WEIGHT LOSS CENTERS, INC. 3 1650 Arch Street 4 22nd Floor 5 Philadelphia, PA 19103 6 (215) 977-2000 7 BY: David E. Landau, Esq., via telephone 8 9 Shawe & Rosenthal, LLP 10 For the Defendant LA WEIGHT LOSS CENTERS, INC. 11 20 South Charles Street 12 Baltimore, MD 21201 13 (410) 752-1040 14 BY: Bruce S. Harrison, Esq., via telephone 15 16 17 18 19 20 21</p>

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1 APPEARANCES:
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20
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1 P R O C E E D I N G S
2 THE COURT: This is the case of Equal
3 Employment Opportunity Commission versus Kathy Koch
4 and LA Weight Loss Centers, Inc. It's
5 Case WDQ-02-648. I am Grimm to whom this case has
6 been assigned by Judge Quarles, the District Judge
7 presiding, to handle discovery disputes in
8 Paper No. 67 of the papers in this file of the Court.
9 In Paper No. 98, I issued a paperless
10 Order setting the hearing for today to begin at four
11 o'clock to rule on an outstanding motion that has been
12 fully briefed, and what I intend to do is to allow
13 counsel to just introduce themselves -- I understand
14 that there's some interns, but we don't need to take
15 the whole time to go through that again -- I just want
16 counsel for the principal parties to identify
17 themselves briefly for the record.
18 I will allow any comments first by
19 Ms. Koch, the moving party, and while I said five
20 minutes, I would be grateful if the time that it has
21 taken us to get this thing started would be taken into

2 (Pages 2 to 5)

<p style="text-align: right;">Page 6</p> <p>1 consideration in terms of any comments. Afterwards, 2 Mr. Landau, who represents the Defendant, LA Weight 3 Loss, will have an amount of time not to exceed five 4 minutes. After that, I intend to rule.</p> <p>5 Ms. Turk, it's important that if you 6 cannot hear what is being said, or if the lawyers or I 7 go too fast, that you immediately say slow down or I 8 lost that, and we will work to your needs.</p> <p>9 Can you hear me so far all right?</p> <p>10 THE REPORTER: Yes, I can.</p> <p>11 THE COURT: All right. Ms. White, go 12 ahead.</p> <p>13 MS. WHITE: Thank you.</p> <p>14 Pamela J. White with Carla N. Bailey 15 for Kathy Koch.</p> <p>16 MR. PHILLIPS: Ron Phillips 17 representing the EEOC.</p> <p>18 MR. LANDAU: David Landau representing 19 LA Weight Loss Centers.</p> <p>20 MR. HARRISON: Bruce Harrison 21 representing LA Weight Loss Centers as local counsel.</p>	<p style="text-align: right;">Page 8</p> <p>1 had performance problems during her employment with LA 2 Weight Loss, please fully describe each specific 3 performance problem and all facts on which you rely in 4 identifying this problem.</p> <p>5 In the absence of Answers to those 6 Interrogatories, they promised to produce responsive 7 documents instead, and in response, in absence of 8 documents or Interrogatory Answers responsive to the 9 Court's Order to Compel, we are reduced to seeking in 10 our Motion for Sanctions an instruction to exclude any 11 evidence that may yet be determined or turned up by LA 12 Weight Loss and to exclude any testimony about Kathy 13 Koch's performance as it existed or as it had been 14 evaluated by LA Weight Loss in March of 1998.</p> <p>15 That's the reason for our Motion for 16 Sanctions. We haven't gotten the performance 17 information. We haven't gotten the documents instead 18 of Answers to Interrogatories. And we still don't 19 have substantive Answers to Interrogatories.</p> <p>20 Thank you, Your Honor.</p> <p>21 THE COURT: All right. Mr. Landau.</p>
<p style="text-align: right;">Page 7</p> <p>1 MS. WHITE: Your Honor, for Ms. Koch, I 2 will tell you as a matter of practice and in this case 3 I dislike Interrogatories. Over the years, 4 Interrogatories and, to a lesser extent, Requests for 5 Production have become a matter of games and 6 gamesmanship when dealing with big litigation. But 7 they are useful for contention purposes, and Koch's 8 Interrogatories were essentially contention 9 Interrogatories.</p> <p>10 I point out Interrogatory No. 4 and 11 Interrogatory No. 8 which were not the subject of the 12 Court's Order to Compel information by LA Weight Loss, 13 but which were recited or cited in our Motion for 14 Sanctions, nevertheless, and I will quote them for the 15 record.</p> <p>16 Interrogatory No. 4 said identify and 17 describe in detail all warnings, cautions, counseling, 18 criticisms, reprimands, adverse evaluations, written 19 or oral, made or communicated to Kathy Koch about her 20 job performance while she was with LA Weight Loss.</p> <p>21 No. 8 asked if you contend that Koch</p>	<p style="text-align: right;">Page 9</p> <p>1 MR. LANDAU: Your Honor, mindful of the 2 Court's initial comment, other than that we disagree, 3 I'm going to rely on my papers, unless the Court has 4 questions.</p> <p>5 THE COURT: All right, thank you.</p> <p>6 All right. The papers here before me 7 that frame the disputes to be ruled on stem initially 8 from Paper No. 70, which was an Order issued by this 9 Court on April 6th of 2004 that partially granted and 10 partially denied Ms. Koch's Motion to Compel, Rule 33 11 and Rule 34, discovery. That motion was Paper No. 58. 12 And subsequently, Paper No. 93, which was an Order 13 awarding a certain amount of money as attorney's fees 14 and costs as a result of Ms. Koch partially prevailing 15 on that motion.</p> <p>16 In Paper No. 94 filed on June 7th, 17 Ms. Koch filed the present Motion for Sanctions. It 18 was opposed under a somewhat abbreviated briefing 19 schedule by LA Weight Loss in Paper No. 97, and a 20 reply was filed yesterday pursuant to that abbreviated 21 schedule in Paper No. 100.</p>

<p style="text-align: right;">Page 10</p> <p>1 I'll note at the outset that there is a 2 good deal about which the parties do not agree, and 3 the depth of the disagreements in the briefing that 4 has been associated with the initial motions that I've 5 referred to and the present motion reflect that, but I 6 will -- I will say that resolving motions of this 7 nature imposes a good deal of demand on the Court to 8 parse through all that, and I am not in the habit of 9 ruling on discovery issues or other issues that are 10 not raised in the briefings.</p> <p>11 And so to the extent that Ms. Koch's 12 opening comments refer to Interrogatory responses or 13 document production responses that were not briefed in 14 the pending motion, they are not right before me, and 15 I will not undertake them. And piecemeal litigation 16 of discovery disputes is particularly abusive of the 17 Court's time and resources, which are strained at the 18 best of times.</p> <p>19 So I'm not going to address anything 20 that was not briefed in the case in chief, which is 21 Paper No. 94.</p>	<p style="text-align: right;">Page 12</p> <p>1 inference instruction to the jury if the case goes to 2 trial with respect to spoliation of evidence. 3 Third, she seeks the imposition of 4 sanctions to include evidence preclusion sanctions 5 pursuant to Federal Rule of Civil Procedure -- and 6 when I use the word Rule, I'm referring to the Rules 7 of Civil Procedure, unless I state otherwise -- 8 37 (b)(2), and she seeks the document, or the evidence 9 preclusion sanctions pursuant to Rule 37 (b)(2) with 10 regard to defenses that were raised by LA Weight Loss 11 to Ms. Koch's Amended Complaint that asserts that 12 Ms. Koch's own performance deficiencies were the 13 result of her, or caused her to be fired and, 14 secondly, that Ms. Koch seeks preclusion of any 15 evidence that LA Weight Loss conducted inadequate 16 investigation into her retaliation claim. And 17 finally, the Plaintiff seeks -- Ms. Koch seeks 18 attorney's fees and costs. 19 Essentially, distilled to its essence, 20 it seems to me that there are two broad areas of 21 relief that Ms. Koch seeks.</p>
<p style="text-align: right;">Page 11</p> <p>1 Indeed, I note that in Paper No. 94, at 2 the conclusion of Ms. Koch's memo, she identifies 3 certain Interrogatories to which the motion is 4 addressed and certain document production requests 5 tangentially in the privilege log. Those were the 6 ones that LA Weight Loss responded to in its paper, 7 and in the reply brief, reference was made to 8 additional document production requests. Those are 9 not before me because they were raised in passing as 10 part of the reply brief and LA Weight Loss had no 11 opportunity to respond; therefore, I do not intend to 12 take them into consideration and will rule only on 13 those matters that were actually briefed in Paper 14 No. 94.</p> <p>15 Now, the relief sought by Ms. Koch in 16 Paper No. 94 is as follows.</p> <p>17 She seeks an Order that LA Weight Loss 18 be required to comply with Paper No. 70, which was the 19 Court's April 6th, 2004, letter Order partially 20 granting the Motion to Compel.</p> <p>21 Secondly, she seeks an adverse</p>	<p style="text-align: right;">Page 13</p> <p>1 First, she seeks to get relief in 2 connection with her assertion that LA Weight Loss 3 failed to preserve documents that related to 4 Ms. Koch's performance of her duties and her ultimate 5 termination when they were under a duty to do so and, 6 secondly, that LA Weight Loss failed to comply with 7 the Court's April 6th Order compelling Rule 33 and 8 Rule 34 discovery. 9 Some factual background will help frame 10 this issue from the pleadings and the memos and the 11 exhibits which have been submitted with respect to 12 this motion. 13 It is helpful to recollect that the 14 EEOC initiated the lawsuit here in February of 2002 on 15 behalf of Ms. Koch in a class of male applicants, and 16 it was asserted by the EEOC that these male applicants 17 had been discriminated against by LA Weight Loss 18 pursuant to an alleged policy to not hire men as 19 weight loss counselors. In addition, the EEOC alleged 20 discrimination against Ms. Koch by LA Weight Loss in 21 that it was alleged that LA Weight Loss retaliated</p>

<p style="text-align: right;">Page 14</p> <p>1 against Ms. Koch for opposing LA Weight Loss' alleged 2 antimale discrimination. 3 Obviously, LA Weight Loss denied these 4 allegations in its responsive answer. 5 Ms. Koch intervened on her own behalf 6 and, in an Amended Complaint, Paper No. 21, asserts a 7 single count claim in her own individual capacity 8 against LA Weight Loss. That count asserts violations 9 of Title VII, the employment discrimination law, based 10 upon a retaliation and, in addition, a claim for 11 violation of 42 United States Code Section 1981, also 12 described as retaliatory discrimination, and a jury 13 demand was filed. 14 In Paper No. 23, LA Weight Loss 15 submitted its answer, and it denies retaliation and 16 denied any policy discriminating against males. 17 As its fifth defense, LA Weight Loss 18 asserts that Ms. Koch was fired for legitimate 19 nondiscriminatory business reasons, and as its seventh 20 defense alleges that it complied in good faith with 21 all antidiscrimination laws.</p>	<p style="text-align: right;">Page 16</p> <p>1 told that their practice was not to hire men as 2 counselors, presumably because the clientele of LA 3 Weight Loss was, in large part, made up of women who 4 might feel uncomfortable with a male counselor with 5 respect to their weight loss goals. 6 Ms. Koch alleges that she disagreed 7 with this policy and that she had attempted to hire or 8 recommend for hiring male applicants that she believed 9 were qualified to serve as counselors. 10 She further alleges that these efforts 11 were rebuked and that when she refused to comply with 12 what she viewed as a discriminatory policy, LA Weight 13 Loss took adverse employment action against her which 14 included several things. 15 Number one, she alleges that she was 16 subject to disciplinary action to include receiving an 17 employee warning notice from her immediate supervisor, 18 Ms. Lynne Portlock, which allegedly was given to her 19 on March 6th, 1998. If this document exists, no copy 20 was attached as an exhibit to any of these papers, but 21 it is referred to frequently in the briefing by the</p>
<p style="text-align: right;">Page 15</p> <p>1 So that's the pleading background that 2 frames the issues that this discovery dispute flows 3 from. 4 The specific facts as alleged by 5 Ms. Koch that frame the dispute that I'm to rule on 6 today, she alleges in her papers and in her pleadings 7 that she was employed for a brief period of time by LA 8 Weight Loss, beginning in November of 1997 and ending 9 on March 12th of 1998 when she was fired. 10 She alleges further that she was hired 11 as an area corporate trainer and that her job 12 involved, in part, interviewing prospective counselors 13 for LA Weight Loss, which is a weight loss 14 organization that appears to have multiple centers, 15 which may or may not be franchises, and a prescribed 16 program of counseling to assist its clients in losing 17 weight, and the counseling includes dietary counseling 18 and the use of foods and possibly supplements to 19 assist them in their weight loss goals. 20 Ms. Koch alleges that when she was 21 trained by LA Weight Loss in November of 1997 she was</p>	<p style="text-align: right;">Page 17</p> <p>1 parties. So this was one example of alleged 2 disciplinary action based upon discrimination. 3 And, in addition, Ms. Koch alleges that 4 she ultimately on March 12th of 1998 was fired. 5 On approximately March 9th of 1998, 6 Ms. Koch alleges that she sent a letter to the Equal 7 Employment Opportunity Commission complaining about LA 8 Weight Loss' allegedly discriminatory policy not to 9 hire males. That was a letter allegedly dated 10 March 8th, 1998. Again, that letter was not attached 11 to any of the pleadings relevant to these motions. 12 What was attached as Exhibit F to Ms. Koch's initial 13 motion, Paper No. 94, is what appears to be a letter 14 from Ms. Koch dated March 8th of 1998 addressed to 15 Ms. Portlock in which she did a number of things. 16 First, the letter states in part -- and 17 I'll refer to it in more detail in a moment -- that 18 she was notifying Ms. Portlock -- and I'm paraphrasing 19 now -- that Ms. Koch had on March 8th, 1998, filed 20 a -- initiated a formal complaint with the EEOC to -- 21 and here I am quoting -- protest the employment</p>

<p style="text-align: right;">Page 18</p> <p>1 policies of LA Weight Loss Centers. 2 Now, this does not identify which 3 specific employment practices were the subject of the 4 complaint. In addition, however, it's very clear that 5 in the letter that Ms. Koch submitted to Ms. Portlock, 6 which Ms. Portlock admits receiving and discussing 7 with certain of her superiors at LA Weight Loss, that 8 among the things stated by Ms. Koch was that she 9 believed that the employee warning notice she received 10 was pretextual and that it was, in her words, part of 11 a fallacious paper trail to achieve some unknown 12 alternative purposes since Ms. Koch had not followed 13 company hiring policy.</p> <p>14 So in the first paragraph of this 15 letter, it makes admittedly a, or what has to be 16 conceded as a somewhat vague reference to company 17 hiring policy in a complaint about employment 18 practices of LA Weight Loss that was made to the EEOC.</p> <p>19 In addition, it's crystal clear that 20 Ms. Koch's March 8th, 1998, letter constitutes what 21 she viewed as a detailed rebuttal of the employee</p>	<p style="text-align: right;">Page 20</p> <p>1 Now, in addition, in multiple discovery 2 requests, Ms. Koch has sought to discover any 3 documents relating to her claim that she was fired in 4 retaliation for her opposition to what she has alleged 5 to be the discriminatory antimale hiring policies of 6 LA Weight Loss.</p> <p>7 An important additional fact is that 8 she was fired on March 12th, less than a week after 9 she sent the letter to Portlock and the letter to the 10 EEOC. So in terms of the temporal relationship 11 between the adverse ultimate employment activity that 12 occurred in this case and the protected activity, 13 activity that is associated with Ms. Koch's claims of 14 retaliation, there is a very close nexus which the 15 Fourth Circuit has commented is relevant in terms of 16 whether or not retaliation took place.</p> <p>17 Among the documents that Ms. Koch has 18 sought through multiple discovery requests would be 19 all documents that may shed light on whether or not 20 she did, indeed, perform her duties as a corporate 21 trainer properly or whether she was deficient as</p>
<p style="text-align: right;">Page 19</p> <p>1 warning notice that she had received from Ms. Portlock 2 on March 6th of 1998 in that she gives a blow-by-blow 3 rebuttal of various grounds that I must assume, since 4 I haven't seen the employee disciplinary notice, were 5 points raised by Ms. Portlock's disciplinary notice.</p> <p>6 Among the things that she does is 7 address how she asserts that she properly used certain 8 flip charts and other training tools to train 9 counselors who were recently hired by LA Weight Loss 10 and who were about to go out and begin their work as 11 counselors, and rebutting, in her view, allegations by 12 Ms. Portlock that Ms. Koch had failed properly to 13 train these counselors to do their jobs.</p> <p>14 In addition, it's pretty clear that 15 Ms. Koch's letter specifically refers to the test 16 scores that her students received when they were 17 tested as being able to prove that she had properly 18 instructed them in accordance with the training 19 objectives of LA Weight Loss and that their grades on 20 these tests would reflect her successful training and 21 that they were not confused as had been alleged.</p>	<p style="text-align: right;">Page 21</p> <p>1 alleged by her boss, Ms. Portlock, her supervisor. 2 In this regard, it appears as though a 3 number of documents identified in summary at Page 15 4 of Document No. 94 would include flip charts, trainee 5 handouts, demonstrative exercises, trainee tests, 6 schedules, agendas, training manuals, and notes from 7 Ms. Koch's supervisors about her performance.</p> <p>8 Now, from my review of the materials 9 provided, it seems clear to me and I find that these 10 documents are not only relevant to the issues here, 11 but they're actually critical because they would be 12 documents that would corroborate either Ms. Koch's 13 claims of retaliation or LA Weight Loss' claims that 14 the reason why she was terminated was because of 15 deficient performance which would constitute a 16 defense; namely, a legitimate nondiscriminatory basis 17 for the adverse action. That's really the central 18 issue of the single count complaint that was filed by 19 Ms. Koch.</p> <p>20 So these documents clearly are 21 critical. They're even more critical because,</p>

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1 obviously, the events that underlie this case as to
 2 Ms. Koch took place in the first quarter of 1998, and
 3 we now find ourselves many years later in 2004, and
 4 it's very clear from the exhibits that were attached
 5 by the parties to their motion papers in this case
 6 that the principal witnesses against Ms. Koch,
 7 Ms. Portlock, her immediate supervisor, and others who
 8 testified, Ms. O'Brian, the training director, that
 9 their memories about the events that underlie her
 10 termination are faded at best and evasive at worst,
 11 and it's not for me to comment on which of those
 12 extremes would be the case, that will be the fact
 13 finder's job if the case goes to trial.

14 But examples of what I mean by the lack
 15 of helpfulness that the exhibits demonstrate reflect
 16 the memories, poor memories of Portlock and O'Brian
 17 are as follows, and these are but examples.

18 In Exhibit G to Ms. Koch's motion,
 19 Ms. Portlock's deposition at Page 486, she testified
 20 that she could not recall the basis for her decision
 21 to fire Ms. Koch because of poor performance.

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1 Ms. Stankunaf had to have taken place after
 2 Ms. Koch's March 8th, 1998, letter rebutting her
 3 disciplinary memo and before her firing.

4 Now, it's also interesting to note that
 5 Ms. O'Brian, the training director, or former training
 6 director, testified in Plaintiff's Exhibit H,
 7 Pages 410 through 414, that she could not recall when
 8 she first was aware of the Koch claim, nor could she
 9 recall being informed of the importance of preserving
 10 documents relating to the Koch performance, nor was
 11 she told that she was under any obligation to preserve
 12 any of her notes or records related to Ms. Koch's
 13 performance of her duties and her termination.

14 In LA Weight Loss' reply memorandum,
 15 Paper No. 97, Exhibit B, again referencing the
 16 Portlock deposition at Page 318, Ms. Portlock was
 17 again very vague on the details of what the
 18 deficiencies were that resulted in Koch's being fired
 19 for improperly training her trainees.

20 Similarly, in Paper No. 97, Exhibit C,
 21 Portlock deposition Page 438, Ms. Koch returned

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1 I have to comment in passing that it's
 2 somewhat hard to get too much assistance from these
 3 depositions since neither side provided a complete
 4 copy of the deposition to allow the Court the context
 5 to review the pages in sequence, but both sides -- in
 6 some instances, more helpfully than in others --
 7 provided snippets, and sometimes there were multiple
 8 exhibits of the same deposition, and to try to divine
 9 the total impact of a witness' deposition testimony
 10 from snippets that have been provided is of limited
 11 assistance.

12 In addition, it's fairly important that
 13 the record reflect that in Exhibit B to LA Weight
 14 Loss' response memo, Paper No. 97, it's clear that
 15 before firing Ms. Koch, Ms. Portlock consulted with
 16 one of her superiors, a Ms. Eileen Stankunaf. In
 17 Ms. Portlock's deposition, she made it clear that she
 18 did consult with Ms. Stankunaf, who was described as
 19 the general manager, about a letter that she received
 20 from Ms. Koch, and since the firing took place on the
 21 12th of March, 1998, the conversation with

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1 various training manuals to Portlock on March 12th of
 2 1998 when she was fired. So, again, whatever
 3 materials, or at least a number of important materials
 4 that Ms. Koch had, were given back to Portlock when
 5 Ms. Koch was fired.

6 In addition, in Paper No. 97,
 7 Exhibit D, Ms. Koch in her deposition, at Page 194,
 8 testified that she returned the flip charts and
 9 training handouts to Ms. Portlock when she was fired.

10 In Paper 97, Exhibit G, Ms. O'Brian's
 11 deposition transcript at Pages 258 through 261, she
 12 acknowledged that she had no personal knowledge of the
 13 training deficiencies associated with Ms. Koch's
 14 performance, but instead was told by Portlock what
 15 those were, and at Exhibit G to Paper No. 97,
 16 Pages 264 through 265, Ms. O'Brian testified that it
 17 was her practice to keep notes on conversations with
 18 subordinates, that she recalled taking notes with
 19 respect to conversations regarding the training
 20 deficiencies by Ms. Koch and, in addition, at
 21 Exhibit G of Paper No. 97, Ms. O'Brian testified that

7 (Pages 22 to 25)

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1 she would generally save those notes for a couple
 2 months before discarding them, that she was never
 3 instructed to maintain them or to keep them, those
 4 regarding Ms. Koch, no one ever told her to keep them
 5 or maintain them, and at Page 263, she testified that
 6 Ms. Portlock had various trainees that were trained by
 7 Ms. Koch put in writing the bases for their
 8 allegations that Koch did not train them properly or
 9 that they were confused by the training they received.

10 So this is all significant because
 11 O'Brian and Portlock, the ones with the allegedly
 12 greatest knowledge about the circumstances for
 13 Ms. Koch's performance deficiencies, which are the
 14 alleged nondiscriminatory reason for her termination
 15 by LA Weight Loss, only Ms. Portlock has personal
 16 knowledge; whatever Ms. O'Brian had, she was told by
 17 Portlock.

18 Portlock appears to be confused because
 19 in Paper 97, Exhibit B, at Page 240, Ms. Portlock
 20 denied ever having a conversation with Ms. O'Brian,
 21 and Ms. O'Brian recalls otherwise.

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1 So O'Brian has nothing that she didn't
 2 learn from Portlock, and Portlock, charitably viewed,
 3 doesn't remember much anymore; less charitably viewed
 4 one might draw less, more adverse conclusions
 5 regarding the nature of her testimony. But, again,
 6 that's not for the Court to assess.

7 Now, I also find that the investigation
 8 that was conducted by employees of LA Weight Loss
 9 regarding Koch's complaint shows an insufficient
 10 effort to preserve, and the explanation for the nature
 11 of this investigation and what was done once Koch was
 12 terminated is, I find, insufficient.

13 First of all, LA Weight Loss claims
 14 that the first knowledge it had of any retaliation
 15 claim was only after it received in about the third
 16 week of March, 1998 -- excuse me -- April, 1998, a
 17 detailed letter from Ms. White, counsel for Ms. Koch,
 18 that detailed the basis for her claims, which included
 19 the retaliation, or the retaliation claim based upon
 20 Ms. Koch's alleged complaints against LA Weight Loss'
 21 alleged discrimination against males.

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1 That letter is Paper No. 97, Exhibit F.
 2 It's an April 21st, 1998, letter from Ms. White to the
 3 CEO of LA Weight Loss.

4 The person who conducted the so-called
 5 investigation was a woman whose last name is Siegel.
 6 She provided an affidavit and a supplemental affidavit
 7 that was attached as an exhibit, and that is Exhibit E
 8 to Document No. 97.

9 She claims that her first knowledge of
 10 the retaliation claim was March 23rd, 1998, after
 11 Ms. White's letter was received and that she
 12 investigated Ms. Koch's complaint. In essence, a fair
 13 summary of what her investigation consisted of was
 14 going to Portlock and O'Brian, asking them if they had
 15 any records, and then either getting records from them
 16 or being told that there were none and then reporting
 17 back to her superiors.

18 Absent from the record before me is any
 19 evidence that any effort was made to notify the
 20 various centers where Ms. Koch may have trained
 21 counselors. Since she was an area trainer, that they

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1 would be facilities in Delaware and Maryland and,
 2 perhaps, elsewhere. There does not appear to be any
 3 instructions to these centers to save the flip charts
 4 and the training aids and the test scores of the
 5 students. There are no written instructions to all
 6 managers or other individuals to assemble that or try
 7 and identify people with knowledge. No instructions
 8 to preserve E-mail.

9 There's reference to LA Weight Loss not
 10 having a system for electronic communications that was
 11 organization-wide, but certainly there is not any
 12 suggestion that there were no E-mails communicated.

13 And there doesn't appear to be any
 14 instruction -- at least, not attached as exhibits that
 15 I saw -- to those who might be in a position to
 16 preserve the record that would help supplement the
 17 clearly deficient memories of Ms. Portlock and O'Brian
 18 about what, indeed, happened that led to Ms. Koch's
 19 termination.

20 Now, LA Weight Loss' position in the
 21 pending dispute is that Koch's March 8th letter to

8 (Pages 26 to 29)

<p style="text-align: right;">Page 30</p> <p>1 Portlock did not mention discrimination against males 2 or retaliation and, therefore, they had no notice of 3 any possible retaliation claim. 4 Secondly, LA Weight Loss contends that 5 it was not until April 21st, 1998, when Ms. White's 6 letter outlined in great detail what the basis of 7 Koch's complaints were that they had any inkling that 8 there was a retaliation claim. 9 It's further their argument that 10 O'Brian initiated a reasonable investigation and that 11 LA Weight Loss' policy -- and I use that word 12 advisedly since no written policy was provided and 13 nothing other than a conclusory description of the 14 policy by Ms. Siegel in her affidavit -- but, in any 15 event, this so-called policy that was referred to by 16 Siegel was that LA Weight Loss would not preserve 17 training materials and flip charts and test scores, 18 the very information sought to prove or disprove the 19 various allegations and defenses by the parties in 20 this case, for the simple reason that LA Weight Loss 21 did not consider them to be personnel records and that</p>	<p style="text-align: right;">Page 32</p> <p>1 records, that the training materials sought were not 2 personnel records, and that they could not possibly 3 have known from what they knew at the time that there 4 was any duty to preserve records relating to 5 Ms. Koch's performance deficiencies because they 6 weren't training records. 7 The duty to preserve documents was the 8 subject of a recent case by this Court in Thompson 9 versus HUD cited by both parties, which is located at 10 219 Federal Rules Decision 93, and beginning at 11 Page 99, that decision discusses the duties to 12 preserve electronic records. 13 It's quite clear in the Fourth Circuit 14 that at Page 99 citing to the Silvestri -- and I'm not 15 going to cite the cases cited in Thompson because 16 they're contained within the Opinion, I'm just going 17 to refer to the first name of the case -- the 18 Silvestri case is discussed at Pages 99 and 100 of the 19 Thompson Opinion. It's crystal clear that the duty to 20 preserve material evidence precedes the actual filing 21 of litigation and it is -- that's the time when the</p>
<p style="text-align: right;">Page 31</p> <p>1 they had no notice of the need to do so until April of 2 1998. 3 Now, a very clear indication of the 4 fallacy of that reasoning is that O'Brian testified 5 that she did, in fact, have documents relating to 6 notes with respect to Koch's performance and that it 7 was her typical practice to keep them for a couple 8 months. And if that were, indeed, her practice and if 9 it was the 12th when Koch was fired and if it was 10 April 21st -- the 12th of March when she was fired and 11 it was April 21st or 23rd when the letter was 12 received -- then a real investigation, a prompt 13 investigation, with an effort toward fulfilling the 14 duty to preserve documents would have, one would 15 imagine, resulted in a better effort to capture and 16 maintain O'Brian's notes regarding the termination or 17 the performance of Koch. 18 In addition, again, LA Weight Loss at 19 Pages 6 and 8 of its brief, Document 97, states that 20 it had a policy -- again, unwritten and described only 21 in general terms -- only to preserve personnel</p>	<p style="text-align: right;">Page 33</p> <p>1 party reasonably should know -- reasonably should know 2 under an objective standard, not a subjective 3 standard -- that litigation could be anticipated. 4 In addition, the Zubulake case cited at 5 Page 100 of the Thompson Opinion states that the duty 6 to preserve has some qualifications and some 7 requirements that affect what a policy -- what a 8 company's retention policy of documents can be. 9 In the Zubulake case, the Southern 10 District of New York stated that once a party 11 reasonably anticipates litigation, it has to suspend 12 its routine document retention or destruction policy 13 and place a litigation hold to ensure the preservation 14 of relevant documents. And that's not an unlimited 15 obligation, but it is an obligation that extends to 16 the key players in the events that led to litigation 17 and, also, to the individuals who were the 18 decision-makers and the documents that are likely to 19 be important to any dispute. 20 Now, we're talking about a very narrow 21 window of time here. This is not a situation where an</p>

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1 employee performed in a less than sufficient way for a
2 number of months and then left and goes off and then
3 first surfaces months or years later to file a
4 complaint.

5 Portlock issued a warning letter to
6 Koch on March 6th of 1998. It was rebutted by Koch's
7 letter on March 8th of '98. Koch is fired on
8 March 12th of '98. And on April 21st, '98,
9 Ms. White's letter to the CEO of LA Weight Loss laid
10 it all out.

11 We're talking about a month and a half,
12 a very short window of time, and somehow the Court is
13 asked to believe that during that brief period of
14 time, to use an excuse that children use in school
15 that the dog ate the homework, the dog ate all the
16 records, and that this undefined, unwritten policy of
17 records retention, resulting from some so-called
18 investigation by Siegel, that everything disappeared
19 and could not be found, and I just don't find that
20 credible. I don't find that credible for the
21 following reasons.

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1 First of all, Koch's letter, which is
2 Exhibit F to Document 94, if you read it fairly, it's
3 clear that it makes reference to the March 6th
4 employee warning notice. It clearly puts LA Weight
5 Loss on a notice that Koch viewed that disciplinary
6 action, that warning, as pretextual, as a fallacious
7 paper trail to achieve unknown alternative purposes
8 since I have not followed company hiring policy.
9

10 That's a direct quote from Exhibit F to
11 Paper 94.

12 Well, what might that hiring policy be?

13 Well, in the very next sentence, we're
14 told that Ms. Koch complained in a formal complaint
15 with the U. S. Equal Employment Opportunity Commission
16 the employment practices of LA Weight Loss Centers.

17 Now, whether or not Ms. Portlock in her
18 subjective capacity could connect the dots and figure
19 out that there was some employment policy that
20 resulted in Ms. Koch's complaint to the EEOC that was
21 involved with hiring, whether or not that involved
discrimination against males or not, is not

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1 dispositive of this because it's an objective
2 standard.

3 You then go on, and in the remainder of
4 the letter that Ms. Koch wrote, she makes reference to
5 her alleged training deficiencies, she talks about the
6 flip charts, the folders and tools, test scores, she
7 alleges her students were neither confused nor
8 unprepared and that the test scores would evidence
9 that.

10 And then at the end, in the final
11 paragraph, there is some vague reference to sexual
12 harassment which, apparently, according to
13 Ms. Portlock, she would have us believe was the only
14 thing that caused her to have any concern because she
15 believed that she was being accused of sexual
16 harassment.

17 The reference points to a pretextual
18 purpose behind the employee disciplinary record, the
19 employment policies of LA Weight Loss, coupled with
20 the references to Koch's rebutting the allegations of
21 her own deficient training, coupled with the

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1 additional fact that we know that Portlock then
2 consulted with Stankunaf before Koch was fired, shows
3 that Portlock understood the gravity of Koch's
4 charges, or she should have if she didn't, and the
5 evidence that she discusses with Stankunaf is in
6 Document 97, Exhibit C, Portlock deposition Pages 433
7 through 34.

8 Moreover, Portlock then at the
9 suggestion of Stankunaf consulted with the Delaware
10 Department of Labor after she received Koch's letter
11 because there was some reference to sexual harassment.
12 This is Exhibit C to Document No. 97, Portlock
13 deposition Pages 420 to 422.

14 So from all of this, it's pretty clear
15 to me, anyway, that objectively viewed that LA Weight
16 Loss was under reasonable notice as of the 8th of
17 March, 1998, that it was to preserve any records
18 relating to alleged deficient performance by Koch, and
19 that since Koch herself referred to some of the very
20 training tools that LA Weight Loss did not believe
21 were personnel documents in her letter, at the same

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1 time she makes reference to employment policies and
2 not toeing the line with respect to LA Weight Loss'
3 hiring practices, there's just no question in my mind
4 that as of March 12th, 1998, LA Weight Loss had a duty
5 to preserve documents relevant to the reasons why Koch
6 was fired, and this includes, but is not limited to,
7 the flip charts, the folders, the test scores, the
8 training aids, the notes from supervisors such as
9 O'Brian.

10 It's further clear to me that under the
11 duty that -- that because LA Weight Loss was under a
12 duty to preserve it, the next inquiry with regard to
13 the issue of spoliation as discussed in Thompson
14 versus HUD is whether or not they preserved it. And
15 even if there was some retention policy, which has
16 been described only in a conclusory fashion by Siegel
17 and was, apparently, unwritten, not to keep these
18 records or not to look at them as employee records,
19 that, as we learned from the Zubulake case, that
20 policy had to be suspended when there was a reason to
21 believe that these documents might be relevant to

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1 and to find out if these training aids that Koch
2 herself referred to in her March 8th memo as being
3 evidence of the fact that the reason why she got the
4 employee warning notice was pretextual. And if
5 there's any evidence this was done, it's absent from
6 the papers filed before me.

7 Furthermore, there appears to be no
8 instructions to O'Brian from counsel or from superiors
9 in LA Weight Loss to O'Brian to maintain her notes and
10 no memos to people other than Portlock and O'Brian to
11 look out and seek documents that I have found there
12 was a duty to preserve.

13 So I find, secondly, that not only was
14 there a duty to preserve, but that it was not complied
15 with.

16 Now, the next step is were these
17 documents relevant or not relevant in the spoliation
18 analysis that's discussed at Thompson versus HUD, and
19 I already found that the documents were not only
20 relevant, but they're critical because given the fact
21 that Portlock is the only person with real personal

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1 litigation.

2 And there's no question in my mind that
3 Koch's memo of March 8th of '98 put LA Weight Loss on
4 that notice.

5 Siegel's investigation, such as it was,
6 was too little too late, and we know for a fact that
7 O'Brian testified that she, in fact, had notes
8 regarding Koch's performance matters, and it was her
9 custom to keep them for a couple months.

10 Now, under Evidence Rule 406, that
11 custom would be admissible to show compliance
12 therewith, and if she did keep them for a couple of
13 months, that would have kept them around until later
14 in April or early May, even. And if, indeed, Siegel
15 had done any kind of investigation worthy of the name
16 of an investigation, they should have been able to be
17 found.

18 And there's, also, simply no evidence
19 of any reasonable effort to try to go out to the
20 centers where Koch performed her training and to
21 interview individuals about what she did or didn't do

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1 knowledge about why Koch was terminated, O'Brian is
2 secondhand and comes from Portlock, and Portlock's
3 knowledge or her memory from the information attached
4 as exhibits to these briefings can be charitably
5 described as vague, deficient, and faded. What we
6 have are conclusory allegations by Portlock that Koch
7 was deficient, and the particulars that could show
8 this -- the training aids, the flip charts, the test
9 scores, any contemporaneous notes that O'Brian may
10 have kept -- are gone.

11 So in this regard, these documents are
12 highly relevant, and the absence of these documents
13 make their clear prejudice to Koch.

14 Now, it's true that because the
15 documents were lost or destroyed that Koch would be
16 able to testify and provide secondary evidence as to
17 the contents of these writings under the original
18 writing rule, under Evidence Rule 1004, Subparagraph
19 1, but the problem is, is that if Portlock says that
20 they stand for something else, then under Evidence
21 Rule 1008, the competing versions go to the jury, and

<p style="text-align: right;">Page 42</p> <p>1 the jury's got to figure out just based upon its 2 ordinary assessment of credibility which version's 3 correct.</p> <p>4 So a loss of these documents that were 5 not preserved is highly prejudicial to Koch because 6 they go to the central issue of whether or not she was 7 fired for a legitimate nondiscriminatory reason or for 8 pretext or for retaliation.</p> <p>9 And for that reason, since the records 10 are highly relevant, the final test is whether or not 11 LA Weight Loss' failure to preserve these records was 12 done with the requisite state of mind to allow 13 spoliation to be found.</p> <p>14 In this regard, as Thompson points out 15 at Page 101, we have three choices; bad faith or 16 knowing destruction, gross negligence, or simple 17 negligence. It's a sliding scale according to the 18 case law; the more culpable a state of mind, the less 19 the plaintiff, or the party that seeks a spoliation 20 instruction, the less relevance it must demonstrate.</p> <p>21 But I've already found that the</p>	<p style="text-align: right;">Page 44</p> <p>1 The spoliation occurred years before 2 any discovery requests that were the subject of Koch's 3 Motion to Compel and my Order compelling discovery, so 4 that it would be improper under Rule 37 (b)(2), which 5 is the sanction that is available when a party fails 6 to obey a Court Order for production of discovery.</p> <p>7 The destruction preceded by years -- 8 the failure to preserve preceded by years the 9 discovery requests and the Court's subsequent Order to 10 produce. So while there may be cases where Rule 37 11 sanctions would be appropriate in addition to a 12 spoliation adverse inference, this is not one of them 13 because there is no evidence that the documents were 14 either destroyed or were not maintained after the 15 Court's Order that they be produced.</p> <p>16 The remaining issue, therefore, is 17 whether or not the specific responses, the 18 supplemental responses, to the Interrogatories and the 19 document production requests that this Court Ordered 20 were deficient so that those responses would form an 21 independent basis under Rule 37 (b) to impose evidence</p>
<p style="text-align: right;">Page 43</p> <p>1 relevance is incredibly relevant and highly critical 2 and, therefore, there is no need to determine whether 3 there was bad faith and knowing destruction.</p> <p>4 At a minimum, it was negligence, and I 5 find under the facts before me that it was grossly 6 negligent. If not grossly negligent, it was 7 negligent. And that this state of mind coupled 8 with -- this culpable state of mind coupled with the 9 high relevance of these documents, the clear duty to 10 preserve, and the clear evidence they did not do so, I 11 find that an adverse inference instruction would be 12 proper to give to the jury if this case goes to trial, 13 and I, therefore, recommend to Judge Quarles that he 14 give exactly such instruction, a spoliation 15 instruction, adverse inference instruction, to the 16 jury regarding the failure of LA Weight Loss to 17 preserve these documents.</p> <p>18 Now, the question is whether or not 19 Rule 37 sanctions also should be imposed.</p> <p>20 I find they should not for the 21 spoliation.</p>	<p style="text-align: right;">Page 45</p> <p>1 preclusion sanctions, and I find that they are not. 2 The following Interrogatories are at 3 issue here, and only these, because these are the only 4 ones that are briefed; Interrogatory No. 6 that dealt 5 with employee retaliation complaints for the 6 Maryland/Delaware region from 1997 to the present, 7 Interrogatory 7 which dealt with all formal employee 8 complaints of retaliation in the same region for the 9 same time for the EEOC, Interrogatory 14 asking for a 10 description of agenda and contents of training 11 provided to corporate trainees, or trainers, in '97 12 and '98, and Interrogatory 17 asked to describe 13 complaints of employees of LA Weight Loss regarding 14 new hire policies.</p> <p>15 As this Court pointed out in Lee versus 16 Flagstaff Industries, and as Ms. White's preliminary 17 comments indicate, Interrogatories serve a function, 18 but it's a limited function. They are not the vehicle 19 for follow-up questions.</p> <p>20 The reasons stated in the Court's 21 original Motion to Compel, or Order to Compel, against</p>

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1 LA Weight Loss stemmed from what the Court perceived
2 to be inappropriate, vague, evasive, conclusory, and
3 factually nonspecific objections to proper discovery,
4 and supplementation was required.

5 I reviewed the supplemental responses.
6 Many of the complaints articulated by Koch to the
7 sufficiency of those answers deal with respect to
8 follow-up questions asserted by Ms. Koch's counsel --
9 we don't know this, we don't know that, we don't know
10 this -- and this is exactly the type of follow-on
11 information that Interrogatories do not well provide.

12 Instead, I believe that it is
13 appropriate to allow Koch some additional discovery in
14 connection with Interrogatory 6, 7, 14, and 17 as
15 follows.

16 With regard to Interrogatory 6, LA
17 Weight Loss identifies as people with personal
18 knowledge Karen Siegel of the investigation and Nicola
19 Fryer. They're alleged as having personal knowledge
20 of any additional details with regard to
21 Interrogatory 6.

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1 But I'm going to require that LA Weight
2 Loss identify a Rule 30 (b)(6) designee; may be
3 Siegel, may be Fryer, may be anybody, may be more than
4 one. That person will be available to be deposed for
5 a period of time not to exceed three additional hours
6 by Ms. White or whatever lawyer in her firm is to take
7 the deposition. They will be able to answer the
8 follow-up questions that Ms. White identifies in her
9 Paper No. 94 as being deficiencies in Answer to
10 Interrogatory No. 6.

11 Because people will be appointed under
12 Rule 30 (b)(6), they will have a duty to inform
13 themselves of the relevant information. They will not
14 be bound by their personal knowledge. And their
15 testimony, because they will be designated by LA
16 Weight Loss, in all likelihood will be looked at by
17 the Court as an admission under Evidence Rule 801
18 (d)(2)(C) or (D). And so if they testify in vague and
19 conclusory fashion, then that will be the best that LA
20 Weight Loss can do at trial.

21 The exact same ruling with respect to

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1 Since many of the issues raised as
2 alleged deficiencies by Koch to their Supplemental
3 Answers deal with follow-up-type questions, I will
4 permit an additional deposition or depositions to be
5 taken by Ms. Koch's counsel, and they'll be of the
6 following nature.

7 First of all, I want to say I read the
8 supplemental responses. They're not perfect, but no
9 responses ever are. And they partly are due to the
10 inherent limitation of Interrogatory Answers.

11 Having said that, part of what it seems
12 to me that Ms. Koch complains about is that there may
13 not be answers to these because LA Weight Loss doesn't
14 know, either because the people who gave reasons
15 before don't remember or the reasons given can't be
16 backed up with anything other than a conclusory
17 statement, or they just don't know, and there's
18 nothing better that you're going to get if that's all
19 they can know. That's not going to help LA Weight
20 Loss at trial if that's the best they can do by way of
21 evidence.

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1 Interrogatory No. 7 and Interrogatory No. 14.
2 Now, with respect to Interrogatory
3 No. 14, LA Weight Loss identifies Dawn Lang and
4 Christie O'Brian. Again, it's up to LA Weight Loss
5 who they want to designate.

6 It will be up to LA Weight Loss in
7 these depositions; if they want to designate one
8 person or two people for all three, they can do it.
9 If they want to have separate ones, they can do that
10 as well.

11 But, in any event, as for the
12 supplemental depositions to get additional details on
13 Interrogatory 6, 7, and 14, it will be LA Weight Loss'
14 obligation under Rule 30 (b)(6) to produce a deponent
15 that is fully prepared to give information, and if
16 they're not, then that's going to inure to the benefit
17 of Koch's trial, and it will not be helpful to LA
18 Weight Loss.

19 With respect to Interrogatory No. 17
20 describing complaints, LA Weight Loss improperly
21 states that it will make certain documents available

<p style="text-align: right;">Page 50</p> <p>1 at a mutually convenient time. In Lee versus 2 Flagstaff, 173 Federal Rule Decision 651 at Pages 654 3 through 55, this Court made clear that that's an 4 improper response to a document production request. 5 I'm going to require that within five 6 business days of today's date or at some other time, 7 if agreed to by counsel for Koch, that all additional 8 documents necessary to respond to any of the existing 9 document production requests or Interrogatories for 10 which there's a continuing supplementation duty will 11 be produced. And then, if there is any need for any 12 follow-up depositions regarding the complaints of 13 other employees, they can be addressed in a 14 Rule 30 (b)(6) deposition similar to that which I have 15 ordered for Interrogatories 6, 7, and 14.</p> <p>16 Now, one other thing I want to comment 17 on before I turn my attention to the privilege log.</p> <p>18 In response to a couple of the 19 Interrogatories, LA Weight Loss made reference to the 20 identity of former employees of LA Weight Loss who 21 could be available to interview -- be interviewed by</p>	<p style="text-align: right;">Page 52</p> <p>1 caution, but it's her peril if she gets this wrong. 2 And since Judge Quarles is not the 3 author of any of those Opinions, none of us knows what 4 his Opinion might be. 5 But there is no way that LA Weight Loss 6 can filter access to these former employees through 7 their counsel, and so I'm going to require that as for 8 any of those individuals LA Weight Loss supplement its 9 Interrogatory Answers to give, if known, a current 10 address and phone number, and Ms. White is free to 11 proceed with them or not proceed with them with or 12 without the permission of LA Weight Loss consistent 13 with her obligations under Rule 4.2. 14 If these individuals are, in fact, 15 represented by counsel, then it's pretty clear what 16 Ms. White can and cannot do, but there is no filtering 17 process by which counsel for LA Weight Loss can 18 prevent access to a former employee. 19 Now, the -- that is, no more 20 restrictive measures than the ethics rule itself 21 provides.</p>
<p style="text-align: right;">Page 51</p> <p>1 counsel for Ms. Koch, quote-unquote, through counsel 2 for LA Weight Loss. 3 This is improper. LA Weight Loss has 4 no legal authority to restrict the access of counsel 5 for Koch to any former employee. 6 It is true under Rule of Professional 7 Responsibility 4.2 that there are ethical limitations 8 on what Ms. White may and may not pursue with these 9 individuals depending upon the status that they occupy 10 with LA Weight Loss; whether they were knowledgeable 11 of confidential information, whether they were a type 12 of person whose statements could constitute 13 evidentiary admissions or liability for LA Weight 14 Loss. 15 And it's true that Ms. White proceeds 16 at some peril if she questions these people improperly 17 under Rule 4.2, particularly since there are no fewer 18 than five published Opinions by this Court taking 19 inconsistent positions with regard to the duty of 20 Rule 4.2 and what a lawyer may or may not do, and that 21 in and of itself will cause Ms. White to proceed with</p>	<p style="text-align: right;">Page 53</p> <p>1 As for the privilege log, it seems to 2 me that at Pages 27 and 28 of Koch's memo that the 3 objections that are raised by counsel are largely 4 speculative. 5 There are four documents in the 6 privilege log. Now, whether or not they like it or 7 not, that's all that's there. If counsel for LA 8 Weight Loss says they're the only ones for which they 9 assert privilege, that's the only ones for which they 10 assert privilege. 11 There's an ongoing duty to supplement; 12 if additional documents pop up, they'll have to 13 supplement the privilege log. 14 In this regard, I note that there is an 15 outstanding issue with regard to one aspect of my 16 earlier ruling in that with respect to Request for 17 Production Document No. 7, LA Weight Loss objected to 18 producing a privilege log for any documents created 19 after the initiation of litigation, and Koch does not 20 object to them not having to produce them. So it 21 seems, given the fact that Koch does not seek a</p>

14 (Pages 50 to 53)

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1 privilege log for those documents and has not opposed
2 the objections filed by LA Weight Loss, that there's
3 simply no reason for Judge Quarles to have to rule on
4 that. I will revise that earlier Order to limit the
5 privilege log obligations pursuant to Request for
6 Production of Document 7 to end with the filing of the
7 complaint. Counsel will give due notice of this to
8 Judge Quarles so that he renders -- he is aware that
9 that dispute is moot because I have modified my Order
10 to withdraw that obligation since Koch does not appear
11 to object to that.

12 Now, with respect to any of the
13 deficiencies with Request for Production of
14 Document 7, 8, 12, 24, and 25 raised at Page 9 of
15 Koch's reply brief, Paper No. 100, they weren't
16 briefed, LA Weight Loss didn't have an opportunity to
17 respond to it, and I'm not addressing them.

18 So this is the Order of the Court.

19 I would like a copy of the transcript
20 of this to be filed, not with the Court, but with me
21 and with -- I will provide a copy to Judge Quarles,

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1 CERTIFICATE OF NOTARY PUBLIC
2 I, Kathleen R. Turk, the officer before
3 whom the foregoing hearing was taken, do hereby
4 certify that the foregoing proceedings were taken by
5 me in stenotype and thereafter reduced to typewriting
6 under my direction; that said record is a true record
7 of the proceedings; that I am neither counsel for,
8 related to, nor employed by any of the parties to the
9 action in which this hearing was taken; and, further,
10 that I am not a relative or employee of any attorney
11 or counsel employed by the parties hereto, nor
12 financially or otherwise interested in the outcome of
13 the action.

14
15

Kathleen R. Turk
Notary Public in and for the
State of Maryland.

17 My Commission Expires:

18 March 1, 2007.

19
20
21

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1 but since this is not done by an official court
2 reporter, I am told by the Clerk's Office it should
3 not be filed with the Clerk's Office but can be sent
4 here and, of course, a transcript can be prepared, but
5 if any exceptions are taken to this ruling, that they
6 can be briefed.

7 I reserve the right to follow this
8 Order up with a Written Opinion, but my reason to have
9 this hearing today was to expedite the response so
10 that the parties would have a ruling and can move on
11 accordingly.

12 So that is the nature of the ruling,
13 and that concludes the hearing.

14 MS. WHITE: Thank you, Your Honor.

15 MR. LANDAU: Thank you, Your Honor.

16 MR. PHILLIPS: Thank you, Your Honor.

17 (Thereupon, at 5:28 p.m., the hearing

18 was concluded.)

19

20

21

15 (Pages 54 to 56)